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IN THE

Supreme Court of the United States

October Term, 1949

No. .....

N. C. HINES, *Petitioner,*

vs.

THOMAS E. EDWARDS, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner above named seeks a writ of certiorari directed to the United States Court of Appeals for the District of Columbia and in support of his petition respectfully shows:

OPINIONS BELOW

The opinion of the District Court denying motion for judgment after verdict is not reported but is in the record (R. 12-14). The United States Court of Appeals filed a

per curiam statement on May 19, 1949 consisting of two short sentences, which is not reported but is also in the record (R. 223).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, (28 U. S. C. 347).

STATEMENT OF THE CASE

Both petitioner and respondent were, and are, residents of Arlington County, Virginia, and both are engaged in the real estate brokerage business in Northern Virginia. Petitioner is also engaged in the real estate business in the District of Columbia and maintains an office in the said District for that purpose.

During the course of a heated campaign in Virginia in 1945, one Charles R. Fenwick was a candidate for the office of Lieutenant Governor. Petitioner was opposed to Mr. Fenwick and in opposition wrote and published a letter, by mailing it to some 200 real estate dealers in that Commonwealth. Among the reasons stated in said letter for petitioner's opposition was a statement that Mr. Fenwick:

> "* * * not only defended him" (meaning thereby the respondent) "in his unethical and dishonest practices as a real estate broker * * *".

The respondent sued the petitioner in the United States District Court for the District of Columbia, and the Complaint was served on him at his real estate office in the District, and not in Arlington County where both resided and where respondent had been an unsuccessful litigant under the Virginia Real Estate Commission Act in an effort to reverse a denial to him of a real estate broker's license.

A motion to dismiss the complaint was filed on the ground that it failed to state a claim upon which relief could

be granted (R. 3) under, of course, the Rules of Civil Procedure for the District Courts of the United States. The motion was granted on November 21, 1946 (R. 4), after, of course, the Statute of Limitations had run at the end of one year following the publishing of the alleged libel on July 12, 1945. (Tit. 12, Sec. 201, D. C. Code, 1940 ed).

In the order entered November 21, 1946, dismissing the complaint, the District Court granted leave of ten days within which to file an amended complaint. Such amended complaint was filed the same day that the order was entered which was after the Statute of Limitations had run.

A motion to strike, to dismiss the amended complaint and for summary judgment was then filed on behalf of petitioner and this motion was also granted except for the phrase contained in the order of January 21, 1947, which is above quoted (R. 8).

Thereupon the petitioner filed his answer to the alleged libelous words retained in the amended complaint by the said order entered January 21, 1947, and pleaded as defenses the truth of the alleged libelous words, fair comment and privilege. (R. 8-9, Third and Fourth Defenses).

A motion of *forum non-conveniens* was filed by petitioner but denied by the Trial Court, apparently because it was not filed until shortly before the trial was scheduled to commence.

Respondent's evidence-in-chief showed that he commenced real estate brokerage business in Arlington County, Virginia, in March 1940 and that on July 17, 1941, his real estate broker's license was revoked by the Commonwealth of Virginia, Virginia Real Estate Commission, by an opinion and order which is found in the record (R. 18-19) as follows:

> "This case having been instituted upon the written complaint of Harry Humfeld and pursuant to the provisions of Section 8, Chapter 461, Acts of the General

Assembly of Virginia, 1924, same coming on to be heard this 17th day of July 1941, upon written notice given Thos. E. Edwards ten days prior to this date.

"Thos. E. Edwards appeared in person and gave testimony in his own behalf.

"Harry V. Humfeld appeared by his counsel, Attorney C. C. Kendrick.

"After hearing the testimony and viewing the exhibits in this cause and carefully considering the same, this Commission is of the opinion that Thos. E. Edwards is guilty of violation of Section 8-G, Chapter 461, Acts of the General Assembly of Virginia, 1924, 'Failing within reasonable time to account for or to remit any moneys coming into his possession belonging to others'.

"Therefore, the license issued to Thos. E. Edwards as a Real Estate Broker for the year ending December 31, 1941, should be and is hereby revoked as of this date.

R. L. Rush
C. V. W. Trice
William L. Tyler,
Commissioners.

"Attest:
C. C. Boisseau, Secretary
July 17, 1941."

The respondent's evidence also showed that the said Virginia Real Estate Commission refused and denied a license to the respondent as a Real Estate Broker for the calendar year 1942 and that no other license was issued to him by said Board until February 17, 1944. (R. 21, Ex. 6; R. 87). The respondent filed a statutory appeal in the Circuit Court for Arlington County where his appeal was heard by a jury of seven men and the action of the Real Estate Commission in 1942 was sustained (R. 87-88).

A copy of the Virginia Real Estate Commission Law is contained in the record as Plaintiff's Exhibit No. 11 (R. 209-222). The material sections thereof are Sections 8 and 9 (R. 217-218). The latter section is the Virginia Court review section under which the proceedings were had in the Arlington County Circuit Court.

Respondent's proof also showed that both he and the petitioner resided in Arlington County, Virginia, and that the

alleged libelous letter of July 12, 1945, was sent to real estate people in Virginia urging them to vote against Charles R. Fenwick who was then a candidate for Lieutenant Governor of that Commonwealth and was believed by the petitioner to be unfriendly to the Virginia Real Estate Commission Act for reasons stated in the said letter.

There was much incompetent, immaterial and highly prejudicial evidence admitted by the trial court on behalf of the respondent over the objections of counsel for the petitioner and contrary to the spirit and purpose of the Rules of Civil Procedure for the United States District Courts.

However, when respondent had rested his case in chief, counsel for petitioner moved for a directed verdict on the ground, in substance, that the facts and official documents proven, or admitted by the respondent, posited questions of law to be determined by the trial court and that upon their correct determination the jury would have to be instructed that the pleaded defenses in the answer of truth, fair comment, and privilege had been established. There was quite an extended argument on this motion, which argument is in the record (R. 32-52), but it seems that the substance of it is contained on page 49, as follows:

> "Mr. Henry: Exactly, but I am saying here that it is not an inference that the jury may draw from these facts because, as a question of law I say to Your Honor, that this Court should hold that the words used in the letter are no more than the reiteration of the record which is in evidence, and that there is no inference that the jury can draw from that contrary to that proposition.
> "The Court: I am sorry. I do not see it."

Also, at page 50-51 of the record the following occurred:

> "The Court: The Court has always got to determine whether there is a sufficiency of evidence to go to the jury.
> "Mr. Henry: All right. I am just stating a cardinal principle and I say to Your Honor that, as a matter of

> fact, this language used, in the light of the statute and the violation in the order, you could only come to one reasonable conclusion with respect to that and, therefore, this language is, as a matter of law, substantial truth as distinguished from the proposition of leaving it to a jury to determine something which is the construction and meaning of words, and there is no conflict of authority anywhere about this proposition that the construction of language in a written document of any kind is for the court to determine, and here is what we have: We have this written language in the letter and we have the written language in the order, and there it is.
>
> "All we have to do is to have the court determine the meaning as gathered from those two things and not something to cast to a jury burden, because the jury has one function in the court of law and that is not always the trier of facts but only the trier of facts after other machinery has been used to exhaust the machinery of the courts."

The trial court refused to accept the argument of counsel for the petitioner that it should instruct the jury that complete legal defenses had been established in the light of the Virginia official documents, namely, the Virginia Real Estate Commission Act, the order entered by the Virginia Real Estate Commission revoking respondent's Real Estate Broker's License on July 17, 1941, the appeal taken by respondent to the Circuit Court of Arlington County, Virginia, and the verdict of the jury on which judgment of that court was entered sustaining the action of the Virginia Real Estate Commission in denying respondent a license for 1942. Truth, privilege and fair comment are each complete defenses to a libel under the law of the Commonwealth of Virginia, as we hereinafter show.

At the close of all of the evidence in the case, counsel for petitioner renewed his motion for an instructed verdict in favor of the petitioner but the trial court denied the motion without any further argument. (R. 53)

The trial court instructed the jury that the above quoted language contained in the phrase which was permitted to remain in the amended complaint was libelous *per se* but left to the jury the question whether the above mentioned Virginia official documents established the substantial truth of the alleged libel (R. 206-208 for such instructions).

The jury evidently failed to understand these Virginia official documents and brought in a verdict of $15,000.00 compensatory damage and $15,000.00 punitive damages against the petitioner. Judgment was entered accordingly on December 22, 1947 (R. 10).

A motion was then filed on behalf of petitioner in accordance with Rule 50(b) of the Rules of Civil Procedure for the United States District Courts to set aside the verdict and enter judgment in favor of the petitioner, for judgment *non obstante veredicto,* or, in the alternative, for a new trial for the reasons set forth therein (R. 11-12), some of which are hereinafter stated as reasons, among others, for allowance of the writ of certiorari.

The trial court denied the said motion (R. 12-15), stating, as we claim, erroneous reasons for its conclusions. The United States Court of Appeals allowed 30 minutes to a side to argue the case and later sustained the judgment in a *per curiam* opinion as follows:

> "We find no substantial error in the record. The judgment of the District Court is therefore affirmed." (223).

COMMONWEALTH OF VIRGINIA LAW INVOLVED

I

The Virginia statute involved is the Virginia Real Estate License Law, Chapter 461, Acts of Assembly, 1924, as amended, Acts 1926, which is also contained in Section 4359 (77) to (91), Michie's Virginia Code, 1942, Annotated.

That statute is printed in the record (R. 209-222) and need not be reprinted herein.

There is also involved Article 1, Section 12 of the Constitution for the Commonwealth of Virginia, as follows:

> "12. *Freedom of the press and speech.*—That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments; and any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

UNITED STATES LAW INVOLVED

II

There are also involved, by the decisions of the courts below, the:

(a) Freedom of the Press and Speech Clause of the First Amendment to the Constitution of the United States.

(b) The Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States.

(c) The Privileges and Immunity Clause in Article IV, Sec. 2 of the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the courts below in the District of Columbia deny to petitioner the protection of the Constitution and statutes of the Commonwealth of Virginia with respect to freedom of speech and press, to which he is entitled by virtue of the fact that he resides in said Commonwealth and the alleged libel was published therein?

2. Should the courts in the District of Columbia undertake to determine transitory actions between nearby residents of the Commonwealth of Virginia, when such transi-

tory actions arose under, and must be determined by, the law of said Commonwealth, and more particularly is this true when the said Courts in the District of Columbia are burdened with large numbers of accumulated cases and have sought the creation of numerous additional judgeships for both the trial and appellate courts?

3. In view of the preceding question, should the court have granted the motion *forum non conveniens* even though made by petitioner on the eve of the commencement of the trial?

4. Is there denial of Due Process of Law within the terms of the Fifth Amendment and violation of the Privileges and Immunity Clause of Article 4, Sec. 2 of the Constitution of the United States when the trial court refused to instruct the jury whether or not substantial truth of the alleged libel was established by the Order entered July 17, 1941 by the Virginia Real Estate Commission revoking respondent's real estate broker's license for the balance of that calendar year, the denial by the said Commission of any license for the succeeding calendar year of 1942, the affirmance of that denial by the Arlington County Circuit Court, a court of record in Virginia, after a trial by a jury, and the terms of the Virginia Real Estate License Law under which the license was revoked, the 1942 application denied, and the denial affirmed on appeal by a court of competent jurisdiction?

5. Is there a denial of Due Process of Law in violation of the Fifth Amendment when a trial court instructs a jury that a written statement is libelous *per se* but refuses to instruct the jury whether Virginia official documents, consisting of a State Statute or statutes, written decisions of the State agencies established to enforce such statutes, and the judgment of the appropriate reviewing court relied upon in defense of truth, privilege and fair comment do, as a matter of law, establish such defenses or any of them?

6. Was there failure and refusal of the courts below in the District of Columbia to apply Virginia law in this case, which failure and refusal are contrary to the rule of this Court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64.

7. Was there failure of the courts below to be controlled by *Nalla* v. *Oyster,* 230 U. S. 165, in refusing to instruct the jury as a matter of law that the Virginia judicial and quasi-judicial judgment and order established the truth of the alleged libel that respondent had engaged in dishonest and unethical real estate practices in failing within a reasonable time to account for or to remit moneys coming into his possession which belonged to another?

8. Whether the courts below did not commit grave judicial error in not holding that under the law of the Commonwealth of Virginia fair comment and privilege were each complete defenses to an alleged libel; that the use of the letter of July 12, 1945 in a political campaign was privileged in Virginia; and that the said letter was fair comment on the quasi-judicial and the judicial records in Virginia which determined respondent "guilty" of failing within a reasonable time to account for or to remit moneys coming into his possession which belonged to another in violation of the Virginia Real Estate License Act?

9. Whether the courts below did not violate Rule 50(b) of the Rules of Civil Procedure for the United States District Courts in not sustaining the petitioner's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial?

10. Whether the courts below did not violate Rule 15(c) of the Rules of Civil Procedure for the United States District Courts in permitting the relating back of a charge of alleged libel in an amended complaint to an original complaint which had been dismissed by the Court after the Statute of Limitations had run.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Each and all of the foregoing ten questions presented in this case constitute sufficient reasons for the grant of the writ of certiorari and the review of the entire case in this Court. In sum, the issues presented in these ten questions involved are most important and some of which appear not to have been decided by this Court.

I

The courts below did fail and refuse, even after the matter had been fully brought to their attention, to apply the law of libel of Virginia and in doing so, they denied to the petitioner the protection to which he is entitled in Virginia under both the Constitution and statutes of that Commonwealth in participating in a political campaign in said Commonwealth and in stating the reasons, based on official documents of Virginia, all of which are public records in Virginia, why petitioner believed the particular candidate was unworthy to hold the office to which he aspired.

The Circuit Court of Arlington County is, of course, a court of record. Its proceedings and judgments are public records, including the appeal by respondent thereto from the denial by the Virginia Real Estate Commission of a license to respondent for the calendar year 1942, the verdict of the jury, and the judgment thereon of the court affirming the said denial of the license.

Also, under the Virginia Real Estate License Act, Section 11 (R. 220-221), the Commission is required to publish semi-annually a list of all licenses revoked or suspended. One such list must be filed with the clerk of every county or corporation in the Commonwealth to be held by him as a public record. Copies of such lists must be mailed by the Commission to every person requesting the same.

Therefore prior to the writing and publishing of the letter of July 12, 1945, the fact of the revocation of respondent's license and the reasons therefor were public records in the office of every clerk of every county in the Commonwealth of Virginia and so also in the office of the Clerk of Arlington County were the public records of the respondent's appeal, trial, verdict, and judgment in the Arlington County Circuit Court.

II

The question immediately arises under Virginia law whether the alleged libelous words, "his unethical and dishonest practices as a real estate broker", (in the past tense as used in the letter of July 12, 1945, referring to particular instances) constitute fair comment on respondent having been found guilty of "Failing, within a reasonable time, to account for or to remit moneys coming into his possession which belong to others" and having had his license revoked therefor.

Under the law of Virginia such fair comment is a defense to libel and the comment is protected by Article 1, Section 12 of the Virginia Constitution, above quoted. Section 6240, Michie's Virginia Code 1942, also provides that:

> "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true * * *".

James v. *Haynes,* 163 Va. 873, 178 S. E. 18

> "The privilege and right of a citizen to comment on matters of public concern is based upon a sound public policy, i. e., the public should be informed of the character, qualifications, and conduct of public officers, and other matters of a public nature, such as the erection of public buildings and the construction of highways. The comment and criticism in such cases may reflect upon the plaintiff in his public actions or conduct; indeed, he would not complain unless they tended in some degree to defame or ridicule him. Sound public policy requires that immunity should be granted news-

papers and other citizens in the discussion of public affairs and where the comment or stricture is based upon established facts, an action does not lie unless there is proof of actual malice, or the language used so far exceeds reasonable limits that malice may be inferred."

III

The letter of July 12, 1945, containing the alleged libelous language shows on its face that it was written and published in the course of a political campaign, attacking the actions of a candidate for public office. The alleged libelous words are privileged because used for the purpose of informing a segment of the public of the conduct in public office of that candidate and as to what was considered to be his hostility to the Virginia Real Estate License Act.

> Article 1, Section 12, Virginia Constitution, Sec. 6240, Michie's Virginia Code, 1942, ed. *James* v. *Haynes,* supra.

In *Rosenberg* v. *Mason,* 157 Va. 215, 160 S. E. 190, the court stated:

> "In Virginia both the truth and privilege are a complete defense in bar of any action for defamation, whether it be for common law slander or libel, or for insulting words, and the same rules of law with reference to the pleadings and proof of these defenses, apply under section 5781, as in actions for common law libel or slander."

IV

The courts below, sitting in the District of Columbia, in a suit between two residents of Virginia, in a transitory cause of action, did not apply the law of Virginia in the matter of defenses of truth, privilege, and fair comment and thereby placed a limitation on the rights of all defendants from the Commonwealth of Virginia who may be sued in the District of Columbia for alleged libel, thereby depriving such defendants of the age-old freedom of speech

and the press guaranteed to Virginians under the law of that Commonwealth.

Indeed, under the rules applied by the courts below, Patrick Henry might have been held liable for slander because of his bitter comments and strictures on the English King of that day and his Board of Trade!

V

The courts below denied the defendant Due Process of Law under the Fifth Amendment to the Constitution of the United States by leaving it to the jury to determine whether the language of the Virginia Real Estate Commission's order of July 17, 1941, the verdict of the jury and the judgment thereon of the Arlington County Circuit Court affirming a subsequent order of said Commission denying the respondent a license for 1942, and the terms of the Virginia Real Estate License Act established the truth, or the substantial truth, of the alleged libelous language of the letter of July 12, 1945, that respondent had engaged in dishonest and unethical practices as a real estate broker.

It is a universal rule in the courts of Anglo-American jurisdictions that the meaning of written documents is for the courts to determine and to instruct the jury accordingly. The trial court did here determine that the hereinbefore quoted phrase in the letter of July 12, 1945 was libelous *per se* but it refused to determine, as a matter of law, whether the truth of the charge was substantially established by the official documents of Virginia relied upon as establishing the truth, privilege and fair comment of the charge.

We insist that both the truth and fair comment of a charge of having engaged in dishonest and unethical real estate practices is established by a quasi judicial opinion and order wherein it is recorded that a real estate broker has had his license revoked and thereafter denied for a

succeeding year for "failing, for a reasonable time, to account for or to remit any moneys coming into his possession which belongs to others". It is certainly so established by a judgment of the appellate reviewing court, based on a verdict of a jury, that the Commission did not err in denying the same real estate broker a license for the next succeeding calendar year.

The courts below abdicated their age-old duty of determining the meaning of words in written documents and thereby overwhelmed the jury by imposing on it the task of determining the meaning of such documents, all of which constituted a denial of Due Process of Law to the petitioner as well as a denial of the legal right of having the suit against him determined in accordance with the law of Virginia where the cause of action, if any, arose.

VI

The alleged cause of action arose on July 12, 1945, and it was barred by the Statute of Limitations on November 21, 1946, when the amended complaint was permitted by the courts below to be filed. The original complaint was dismissed by the trial court after the Statute of Limitations had run. The dismissal was because of the failure of the original complaint to state a cause of action. The amended complaint attempted to state new causes of action on the claim that they related back to the original complaint under Rule 15(c) of the Rules of Civil Procedure for the United States District Courts.

The courts below struck out all of the charges of libel in the amended complaint except the hereinbefore quoted phrase that:

> "He not only defended him" (meaning thereby the respondent) "in his unethical and dishonest practice as a real estate broker".

The reasons for the retention of such phrase are set forth by the Motions' Judge and are contained in the

record (R. 29-32). We submit that the Motions' Judge misinterpreted and misapplied Rule 15(c) of the Rules of Civil Procedure for the United States District Courts in that there was nothing properly pleaded in the Original Complaint to which the said phrase in the Amended Complaint could relate back to.

The application of this rule has not been but should be determined by this Court.

VII

The courts below should have granted the motion *forum non conveniens* and sent the case to the Arlington County Circuit Court for trial where the parties resided, even though the motion was made on the eve of the trial. The cause of action involved the Constitution, statutes, judicial and quasi-judicial records as well as the public policy of the Commonwealth of Virginia, all of which the courts of Virginia are peculiarly equipped by training and experience to determine.

Furthermore, the civil and criminal dockets of the courts in the District of Columbia are well known to be greatly in arrears, so much so that Congress had been requested to provide additional judges for both the trial and appellate courts in said District.

Nothing is to be gained in this or other respects by the courts in the District of Columbia taking jurisdiction of transitory causes of actions which arise in, or which are between residents in the nearby counties of Virginia and Maryland, thereby making the District of Columbia a little Reno for those plaintiffs who have had unsuccessful experiences in the local courts of their respective States and who are able to secure service on their adversaries in the District of Columbia jurisdiction, as did the respondent here in both instances.

VIII

In a suit in the Federal Courts of the District of Columbia on a transitory action for libel arising in Virginia between two residents of Virginia, the Federal Courts in the District of Columbia may not enter judgment for punitive damages.

WHEREFORE, the petitioner prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia to the end that the questions involved may be fully presented to this Court and Justice done in the premises according to the Constitution and laws of the United States and of the Commonwealth of Virginia.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1949

No. .....

N. C. HINES, *Petitioner*,

vs.

THOMAS E. EDWARDS, *Respondent*,

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JURISDICTION

Jurisdiction of this Court to entertain this petition and to grant the writ of certiorari to the United States Court of Appeals for the District of Columbia has been referred to in the petition and is contained in Title 28, Section 347, U. S. Code.

OPINION BELOW

The opinion below has not been published. The United States Court of Appeals rendered a per curiam statement dated May 19, 1949, of two lines which is contained in the record (R. 223), namely, "We find no substantial error in the record. The judgment of the District Court is therefore affirmed".

STATEMENT OF FACTS

A statement of the essential record facts, for purposes of this petition, is contained in the petition and need not be repeated in this brief. We may briefly supplement the same by stating that this suit in the United States District Court for the District of Columbia was between two Virginia residents in adjoining Arlington County and involved a transitory action for alleged libel which took place wholly within Virginia. Both parties were engaged in the real estate brokerage business in Virginia, though petitioner had a real estate broker's license in the District of Columbia and also engaged in the business of buying and selling real estate in the said District.

Petitioner had served two terms as President of a voluntary association of real estate brokers, known as the Alexandria-Arlington-Fairfax Real Estate Board which is not to be confused with the Virginia Real Estate Commission. The latter is a Commonwealth of Virginia agency of Government charged with the administration and enforcement of the Virginia Real Estate License Act, as amended.

While the respondent had opened his real estate office in Arlington County in March 1940 (R. 86), he was not a member of the Alexandria-Arlington-Fairfax Real Estate Board. In the early summer of 1941 a complaint was filed against him with the Virginia Real Estate Commission, as provided in Sections 8 and 9 of the Virginia Real Estate License Act (R. 217-218), notice of hearing was issued to him by the said Commission, a hearing held, and under date of July 17, 1941, the Commission issued an order on the complaint of Mr. Harry Humfeld revoking the license issued to respondent. (R. 18).

The reasons for such revocation are stated in the order to be that respondent failed "within reasonable time to account for or to remit moneys coming into his possession belonging to others," which is one of the offenses named

in paragraph (g) of Section 8 of the Virginia Real Estate Commission Act for the revocation or denial of a license to a real estate broker (R. 217).

There appears to have been no criminal proceedings instituted against the respondent as provided in Section 12 of the said Virginia Real Estate License Act (R. 221) as could have been done.

However, the Commission did deny respondent a real estate broker's license for the calendar year 1942 and as stated in the petition, the respondent did appeal therefrom to the Arlington County Circuit Court in accordance with the procedure provided in the latter part of Section 9 of the Virginia Real Estate License Act which entitled the appellant to a trial of issues of fact by a jury. (R. 219). After a trial by jury and an adverse verdict, the Circuit Court entered a judgment affirming the ruling of the Virginia Real Estate Commission in the denial of the license.

The respondent had no broker's real estate license from July 17, 1941, to February 17, 1944, when another license was issued to him for the balance of the calendar year 1944. Mrs. Nellie Edwards, wife of the respondent, testified that the Virginia Real Estate Commission had also revoked her license as a real estate broker at the end of 1942 and all of 1943 (R. 67). Thus for a considerable period neither respondent nor his wife could act as a real estate broker.

During the summer of 1945, a political campaign was being waged in the Commonwealth of Virginia. Among the candidates for various offices was a resident of Arlington County by the name of Charles R. Fenwick who was then a State Senator and a candidate for the office of Lieutenant Governor of the Commonwealth. The petitioner was opposed to the election of Mr. Fenwick to the office sought by him and, as a part of that opposition, the petitioner composed a letter dated July 12, 1945, addressed to all Realtors and Property Owners which he mailed to some 200 real estate dealers in various sections of Virginia.

This letter in its entirety is printed in the record (R. 16-18) wherein the petitioner stated that he had served for two successive terms as President of the Alexandria-Arlington-Fairfax Real Estate Board and enclosed a resolution which that Board had adopted on April 24, 1943, referring to Mr. Fenwick. In this letter the petitioner stated several reasons why he did not believe that Mr. Fenwick should be supported for the office he sought and among these reasons was one that Mr. Fenwick had used his influence to have the respondent placed on the Gasoline Rationing Board in Arlington County, "knowing at the same time that Edwards' Broker's License had been revoked by the Real Estate Commission and a jury had sustained the Real Estate Commission's decision."

It was further stated in said letter that Mr. Fenwick appeared and defended the respondent when the Office of Price Administration gave a hearing to the protestants of Arlington County against the service of the respondent on such Gasoline Rationing Board and that:

> "He not only defended him in his unethical and dishonest practices as a real estate broker but he advised Edwards not to resign, and used all of his political influence to retain Edwards on the Rationing Board. It was to his chagrin and disappointment, therefore, that the regional director of the OPA, after conducting a thorough investigation, overruled Mr. Fenwick and removed Edwards from the Board." (R. 17).

Approximately 11 months thereafter a complaint was filed by Washington, D. C., counsel on behalf of Mr. Edwards in the United States District Court for the District of Columbia against the petitioner charging libel (R. 2). This Complaint was dismissed by an order filed November 21, 1946 because the complaint failed to state an action of libel (R. 4). By that time the one-year District of Columbia Statute of Limitations had run but leave was given to file an amended complaint within ten days and it was filed on November 21, 1946.

The petitioner promptly moved to strike the amended complaint on the ground that all possible libel arising out of the letter of July 12, 1945, was then barred by the Statute of Limitations and that the amended complaint attempted to state entirely new causes of action after the Statute of Limitaions had run against them. The Motions' Judge granted the motion in part, only, retaining in the amended complaint the alleged libelous words in the letter of July 12, 1945, hereinbefore quoted.

There followed the answer setting up the defenses of truth, privilege and fair comment and the trial as heretofore stated in the petition for certiorari and to which reference is made.

POINTS RELIED UPON

I.

THE COURTS BELOW HAVE IMPROPERLY INTERPRETED AND/OR DISREGARDED THE FOLLOWING RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, NAMELY, 12 (b), 15 (c) 46 AND 50.

II.

THE PETITIONER HAS BEEN DENIED BY THE FEDERAL COURTS OF THE DISTRICT OF COLUMBIA IN THE JUDGMENT ENTERED AND AFFIRMED IN A TRANSITORY CAUSE OF ACTION OF LIBEL ARISING IN THE COMMONWEALTH OF VIRGINIA OF HIS DEFENSES OF TRUTH, PRIVILEGE, AND FAIR COMMENT TO WHICH HE IS ENTITLED UNDER THE LAWS OF VIRGINIA.

III.

THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA, GREATLY OVERBURDENED WITH UNHEARD AND UNDECIDED CASES, HAVE ERRED

IN DENYING PETITIONER'S MOTION *FORUM NON-CONVENIENS* AND IN TAKING JURISDICTION OF A TRANSITORY ACTION OF LIBEL ARISING IN ARLINGTON COUNTY, VIRGINIA, BETWEEN TWO RESIDENTS OF VIRGINIA.

IV.

THE FEDERAL COURTS BELOW IN THE DISTRICT OF COLUMBIA HAVE FAILED AND REFUSED TO APPLY THE LAW OF THE COMMONWEALTH OF VIRGINIA WHICH PROVIDE AS DEFENSES TO ALLEGED LIBEL THE TRUTH, PRIVILEGE, AND/OR FAIR COMMENT.

V.

THE PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AND HIS PRIVILEGES AND IMMUNITIES AS PROVIDED IN ARTICLE 4, SEC. 2, OF THE UNITED STATES CONSTITUTION IN THE COURTS BELOW BY THEIR REFUSAL TO DETERMINE AS A MATTER OF LAW THAT THE ORDERS AND OPINIONS OF A QUASI-JUDICIAL AGENCY OF THE COMMONWEALTH OF VIRGINIA AND A JUDGMENT OF A COURT OF RECORD OF VIRGINIA ESTABLISH THE SUBSTANTIAL TRUTH OF THE ALLEGED LIBEL, THEREBY LEAVING TO THE JURY TO DETERMINE THE MEANING, FORCE, AND EFFECT THEREOF.

VI.

THE PETITIONER HAS BEEN DENIED HIS FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ALSO IN VIOLATION OF ARTICLE 1, SEC. 12 OF THE CONSTITUTION OF VIRGINIA IN A PUBLIC POLITICAL CAMPAIGN IN

VIRGINIA BY THE ACTION OF THE FEDERAL COURTS BELOW IN THEIR REFUSAL TO HOLD THAT THE OFFICIAL RECORDS OF VIRGINIA ESTABLISH THE TRUTH, PRIVILEGE, AND FAIR COMMENT OF THE ALLEGED LIBEL.

VII.

THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA MAY NOT ASSUME JURISDICTION OVER AND DETERMINE TRANSITORY CAUSES OF ACTION ARISING IN THE NEARBY COUNTIES OF VIRGINIA BETWEEN RESIDENTS OF VIRGINIA, THEREBY CREATING A LITTLE RENO OF THE DISTRICT OF COLUMBIA IN WHICH NON-RESIDENT PLAINTIFFS MAY WASH THEIR DIRTY LINEN WHEN THEY CAN SECURE PERSONAL SERVICE ON NON-RESIDENT DEFENDANTS IN SAID DISTRICT.

VIII.

IN A SUIT BROUGHT IN THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA ON A TRANSITORY ACTION FOR LIBEL ARISING IN VIRGINIA BETWEEN TWO RESIDENTS OF VIRGINIA, THE FEDERAL COURTS FOR THE DISTRICT OF COLUMBIA MAY NOT ENTER JUDGMENT FOR PUNITIVE DAMAGES AS WAS DONE IN THIS CASE.

ARGUMENT

Since the United States Court of Appeals wrote nothing more than a two-line *per curiam* statement to the effect that it found no substantial error in the record, the petition and brief are prepared on the basis that said court affirmed whatever had been done by the trial court.

Our first point of argument relates to the Rules of Civil Procedure wherein we believe that said courts erred.

I.

INVOLVED RULES OF CIVIL PROCEDURE FOR THE U. S. DISTRICT COURTS

(a)

Rule 15 (c)

Of course, the amended complaint not having been filed until November 21, 1946, or more than one year after the date of the alleged libel on July 12, 1945, any cause of action set up therein is barred by the one-year Statute of Limitations. The respondent claimed in the Motions' Court that the several alleged libels stated in the amended complaint related back to, and were saved by, the original complaint under the terms of Rule 15(c) as follows:

> "*Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The original complaint was dismissed in its entirety because it had failed to follow the rule of pleading libel by setting forth the alleged libelous words *in haec verba.*

The so-called amended complaint filed on November 21, 1946, was not an amendment such as is contemplated by Rule 15(c) but was in fact a new complaint. It could not relate back to the original complaint, because that complaint no longer existed. Moreover, the language quoted *in haec verba* in the amended complaint from the letter of July 12, 1945 and held by the trial court to be libelous *per se,* is quite unlike any language in the original complaint.

The language of the original complaint is that petitioner mailed a letter wherein he stated that the respondent "was dishonest and unethical", which is quite different to the

statement in the alleged libelous letter that Mr. Fenwick defended the petitioner "in his unethical and dishonest practices as a real estate broker." Not the same words are used; one statement is of general and present application and the other relates to specific past practices.

The adoption of the interpretation of this Rule urged by the respondent, even to the limited extent approved by the Motions' Judge, would be, in our opinion, equivalent to a holding that this Rule permits and authorizes exactly what was done in this case, namely, rewriting of a complaint to state a cause of action barred by the Statute of Limitations under the guise of amending an original complaint filed before the said Statute had run but which failed to state a cause of action.

(b)

Rule 12 (b)

It was claimed by counsel for respondent in the court below that when counsel for petitioner filed his answer to the bill of complaint after the bar of the Statute of Limitations was sustained in part, only, any further defense of the bar of the Statute of Limitations was waived as to the language saved in the amended complaint by the order of the Motions' Judge.

In view of the *per curiam* opinion by the United States Court of Appeals it must be assumed that respondent's argument was approved in this respect notwithstanding the terms of Rule 12(b) that certain defenses may, at the option of the pleader, be asserted by motion, including lack of jurisdiction over the subject matter and failure to state a claim on which relief may be granted.

The petitioner was not required, in order to preserve the bar of the Statute of Limitations, to repeat in his answer the motion made invoking the bar of the Statute of Limitations and which had been sustained in part, only. Compare:

Gossard v. *Gossard,* 149 Fed. (2) 111
Berry v. *Chrysler Corp.,* 150 Fed. (2) 1002
Panhandle Eastern Pipe Line Co. v. *Parish,* 168 Fed. (2) 238
Wright v. *Bankers Service Corp.,* 39 Fed. (Supp.) 980
Sinclair v. *Gypsum Co.,* 75 Fed. (Supp.) 439.

(c)

Rule 46

After extended argument of petitioner's counsel to the trial court at the conclusion of respondent's case that the motion for a directed verdict in favor of petitioner should be granted on the basis of the court interpreting the Virginia official documents, hereinbefore referred to, and instructing the jury that these documents established the substantial truth of the alleged libel, the said court denied the motion. It declined to hear further argument on the renewal of the motion at the close of all the evidence in the case and again denied the motion.

In view of the adamant negative position of the trial court on the issue that he should instruct the jury that these official Virginia documents established the substantial truth of the alleged libel, trial counsel for petitioner deemed it unnecessary to further argue the matter by the submission of specific requests for instructions to the jury that such documents established the substantial truth of the alleged libel, and showed the privilege. After the court had clearly indicated its intention not to give the instruction on fair comment, such trial counsel withdrew the same (Manuscript Rec. 488).

The trial court clearly indicated that its position had not changed when it inquired at the conclusion of its instructions:

> "Is there any charge that the court has failed to give other than those I have ruled upon, or the clarification of any that I have given that counsel thinks I should make?" (R. 208)

Rule 46 of the Rules of Civil Procedure does not contemplate nor require that counsel shall engage in a more or less continuous argument with a court concerning its rulings. That Rule states:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him".

It would have been a useless gesture on the part of counsel for petitioner to submit to the trial court and argue for a third time motions in the form of requested instructions to the jury that this trial court interpret the Virginia official documents in evidence and apply the law of Virginia in his instructions to the jury that truth, privilege and fair comment established by such documents constituted a complete defense to the charge of alleged libel.

The petitioner's counsel made it clearly and unequivocably known to the trial court that he considered the law of Virginia to be controlling and that he also believed that these official Virginia documents established the truth of the allegel libel. He further made it known to the trial court that he considered it to be the legal duty of the said court to interpret and determine the meaning of these official Virginia documents and not leave the same to the jury to determine. The trial court emphatically informed petitioner's counsel that he would instruct the jury, and he did instruct the jury, that it was for them to determine whether an ordinary reader would conclude that the published facts would be more harmful to the respondent than the statement of facts as established by the evidence (R. 206-207).

Moreover, the entire matter was summed up and stated in the motion submitted by counsel for petitioner after the verdict had been rendered and the judgment entered. (R. 11-12) but again the trial court rejected the same (R. 12-15). Since the Court of Appeals wrote no opinion, it must be considered that said court determined that the trial court made no substantial error in this respect.

(d)

Rule 50.

It may be that the appellate court below accepted the argument of respondent's counsel that a party who moves for a directed verdict at the close of a plaintiff's case and then introduces evidence when the motion is denied, may not thereafter urge error in such denial.

Incidentally Counsel for respondent cited in support of his argument the District of Columbia case of *Capital Transit Company* v. *Gamble,* 82 U. S. App. D. C. 57, 160 Fed. (2) 283, decided after Rule 50 became effective but which completely ignored the same. It may be that the appellate court below again concluded that petitioner's rights were waived when he introduced evidence following the denial of the motion for directed verdict following the close of respondent's evidence in chief.

In any event, the action of the courts below in failing, as it seems to us, to give effect to the applicable Rule 50 of the Rules of Federal Civil Procedure is such that this case should be reviewed in this Court and the error corrected in the application of this Rule.

II.

THE PETITIONER HAS BEEN DENIED BY THE FEDERAL COURTS BELOW IN THE JUDGMENT ENTERED AND AFFIRMED IN A TRANSITORY CAUSE OF ACTION OF LIBEL ARISING IN VIRGINIA HIS DEFENSES OF TRUTH, PRIVILEGE AND FAIR COMMENT TO WHICH HE IS ENTITLED UNDER THE LAWS OF VIRGINIA.

This proposition posits an extremely grave matter. If we are correct, the action of the Federal courts below amounts to setting aside the law of Virginia in favor of the views in this matter of the lower courts which, in all due deference, are not even in accord with the laws of the District of Columbia.

There can be no doubt but that the law of Virginia does afford the petitioner the defenses of truth, privilege and fair comment in an action of libel arising in that Commonwealth and there likewise can be no doubt that this action between two residents of Virginia, concerning an alleged libel published in Virginia is governed by the law of Virginia.

Article 1, Section 12 of the Virginia Constitution guarantees freedom of speech and press in Virginia in the following language:

> "*Freedom of the press and speech:* That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments; and any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

Section 6240, Michie's Virginia Code, 1942 ed., makes truth a complete defense to libel in the following words:

> "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written are true * * *".

The Supreme Court of Appeals of Virginia in *Rosenberg* v. *Mason,* 157 Va. 215, 160 S. E. 190, declared the law of Virginia in this respect as follows:

> "In Virginia both the truth and privilege are a complete defense in bar of any action for defamation, whether it be for common law slander or libel, or for insulting words, and the same rules of law with reference to the pleadings and proof of these defenses apply under section 5781 as in actions for common law libel or slander."

Again in *James* v. *Haynes,* 163 Va., 873, 178 S. E. 18, the same Virginia court stated the law of that Commonwealth in the following language:

> "* * * the privilege and right of a citizen to comment on matters of public concern is based upon a sound public policy, i.e., the public should be informed of the character, qualifications, and conduct of public officers, and other matters of public nature, such as the erection of public buildings and the construction of highways. The comment and criticism in such cases may reflect upon the plaintiff in his public actions or conduct; indeed he would not complain unless they tended in some degree to defame or ridicule him. Sound public policy requires that immunity should be granted newspapers and other citizens in the discussion of public affairs and where the comment or stricture is based upon established facts, an action does not lie unless there is proof of actual malice, or the language used so far exceeds reasonable limits that malice may be inferred."

The petitioner alleged in his answer to the amended complaint the truth, privilege and fair comment of the alleged libelous words contained in his letter of July 12, 1945. Mr. Fenwick was then a public officer and a candidate for a much higher officer. The respondent held a license from the Commonwealth of Virginia as a real estate broker immediately before his license was revoked on July 17, 1941, and was thus then a public officer or a quasi-public

officer. The petitioner was privileged to criticise each of them so long as his comments were truthful and fair.

Moreover, *Nalla* v. *Oyster,* 230 U. S. 165 held that the truth was a complete defense of an alleged libel in the District of Columbia. However, it is not clear that the defenses to a libel of privilege and fair comment are available in said District and if they are available, they were not applied in this case.

The alleged libelous letter of July 12, 1945, shows on its face that it was written and used in a political campaign in opposition to a candidate for public office. It also shows that respondent was a licensed real estate broker at the time his license was revoked. Thus the privileged occasion for the letter was also established by it.

The truth of the alleged libel was established by the quasi-judicial opinion and order entered July 17, 1941 by the Virginia Real Estate Commission revoking respondent's real estate license for the balance of the calendar year 1941 because he had been found "guilty", after public hearing, of the offense named in section 8(g) of the Virginia Real Estate License Act, namely:

> "Failing within reasonable time to account for or to remit any moneys coming into his possession belonging to others". (R. 18-19).

The respondent admitted on the witness stand that he applied for a real estate broker's license in 1942; that it was denied by the Virginia Real Estate Commission; that he appealed from such denial to the Circuit Court for Arlington County; that his appeal was heard in said court by a jury; that the jury rendered an adverse verdict; and that judgment was entered by the court affirming the denial. (R. 87-88). Thus in the latter respect there is an adverse judgment of a court of competent jurisdiction similar to the situation in *Nalla* v. *Oyster,* supra.

It was the duty of the trial court to have instructed the jury as a matter of law, in accordance with petitioner's

motion, that the truth of the alleged libel was established by the order and opinion of the Virginia Real Estate Commission finding respondent "guilty", in the language of Section 8 of the Virginia Real Estate License Act, of a dishonest and unethical act as a real estate broker in failing within reasonable time to account for or to remit moneys coming into his hands belonging to the complainant, Harry Humfeld, and revoking the license by reason thereof.

Also, it was the legal duty of the trial court to instruct the jury that the adverse verdict of the jury in the Circuit Court of Arlington County and the judgment of that Court affirming the action taken by the said Commission in denying respondent a license for 1942 likewise established the truth of the failure of respondent within reasonable time to account for or to remit moneys coming into his hands as a real estate broker belonging to others.

The question is a legal one whether the words "unethical and dishonest practices as a real estate broker" mean substantially the failure of the respondent real estate broker "within reasonable time to account for or to remit moneys coming into his possession belonging to others", as the Real Estate Commission found that respondent had done and also whether the words "unethical and dishonest practices as a real estate broker" constituted fair comment on a finding and order of the Commission that the respondent was "guilty" of having retained in his possession for more than a reasonable time moneys which had come into his possession belonging to others.

These legal questions were not ones to be left to a jury to determine. They were questions for the court and in making that determination the court was required to consider the Virginia Real Estate License Act as a whole, including the succeeding subsection (j) of Section 8 which provides that:

> "Any other conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent or dishonest dealing."

and also Section 12 of said Act which provides that upon conviction any person violating any provision of the act shall be punished by a fine of not more than $500.00 or by imprisonment for a term not to exceed six months or by both such fine and imprisonment. And further, that such conviction should not be construed to release any person from civil liability or criminal prosecution under the general laws of Virginia.

That is to say, by the terms of subsection (j) of Section 8 of the Virginia Real Estate License Act, the offense for which respondent's license was revoked and further licenses denied until nearly three years later is defined as an "improper, fraudulent and dishonest dealing" and, in addition to the revocation of the license, the respondent was made subject to fine and/or imprisonment. It does not appear from the record that there were any proceedings against respondent under Section 12 of the Act or under the general civil and criminal laws of Virginia, but that is immaterial so far as the seriousness of the offense is concerned.

It is seems unquestionable that the petitioner established truth, fair comment and privilege of the alleged libel and that the court would have been compelled to so instruct the jury had it not abdicated its function in this respect by dumping the legal documents and the statute in the laps of the jurymen with the instruction, in effect, for them to determine whether an ordinary reader would reach the conclusion that the truth of the alleged libel had been established by the evidence. By so doing the courts below denied the petitioner the benefit and protection of the Constitution and laws of Virginia to which he is legally entitled.

III.

THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA, GREATLY OVER-BURDENED WITH UNHEARD AND UNDECIDED CASES, HAVE ERRED IN DENYING PETITIONER'S MOTION *FORUM NON-CONVENIENS* AND IN TAKING JURISDICTION OF A TRANSITORY ACTION OF LIBEL ARISING IN ARLINGTON COUNTY, VIRGINIA, BETWEEN TWO RESIDENTS OF VIRGINIA.

The alleged libel occurred in and was limited to Virginia. The suit involved two residents of Virginia. The respondent, having admitted on the witness stand that he had been an unsuccessful litigant in the Circuit Court of Arlington County, in an attempt to set aside the denial by the Virginia Real Estate Commission of a license to him for 1942, deliberately sought out the petitioner in the District of Columbia and filed suit against him in that jurisdiction instead of filing it in the Circuit Court of Arlington County.

Unfortunately the record leaves it to conjecture why this was done. Also, unfortunately, trial counsel for the petitioner did not file his motion *forum non-conveniens* until the eve of the trial in the court below.

But the responsibility of referring a case to a more convenient forum does not rest alone upon counsel for the defendant. The court itself has a duty to perform, particularly when that court is greatly overburdened with litigation arising within the terrtiorial jurisdiction of the court.

It is beyond dispute that it has been claimed for a considerable period of time that the civil dockets, particularly, are greatly in arrears in the District of Columbia and that

recommendations have been made to the Congress for the creation of additional judgeships in both the United States District Court and in the United States Court of Appeals. Even as this brief is being written, legislation is nearing final enactment to create some three additional judgeships in the United States District Court and three additional judgeships in the Court of Appeals. Furthermore, visiting judges from other jurisdictions have been frequently brought from other jurisdictions to assist with the local court docket of cases, civil and criminal.

In the face of the great arrears in both the trial and the appellate Federal courts in the District of Columbia, the trial judge, on his own motion, should have denied jurisdiction of this case and relegated the plaintiff to the Circuit Court of Arlington County, a court experienced in the law and public policy of that Commonwealth.

The trial court having failed to do so on its own motion and having denied a motion filed by petitioner for that purpose, the United States Court of Appeals should have reversed the trial court on that ground alone if none other. However, the appellate court, being itself so overburdened that it did not take the time to write an opinion in this most important case, could only write a statement that no substantial error was in the record.

We submit that this one point constitutes substantial error on the part of both courts. More than that, there is raised a very serious question of judicial administration when the Federal courts in the District of Columbia are permitted to take jurisdiction over a transitory action of libel arising in, and governed by the law of the State of the two non-resident parties. In this instance, the inference is clear that the respondent did not want to wash his dirty linen again in the local court of his residence.

IV.

THE FEDERAL COURTS BELOW IN THE DISTRICT OF COLUMBIA HAVE FAILED AND REFUSED TO APPLY THE LAW OF THE COMMONWEALTH OF VIRGINIA WHICH PROVIDE AS DEFENSES TO ALLEGED LIBEL THE TRUTH, PRIVILEGE, AND/OR FAIR COMMENT.

Irrespective of all else, the Federal courts below were required under the principles stated by this court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, and related cases to apply the law of Virginia in the trial of this transitory action for libel arising in Virginia between two residents of the State.

That we submit the said courts did not do.

They did not even apply *Nalla* v. *Oyster,* supra, which, for the District of Columbia, stated the rule to the effect that where a judicial proceeding in another case established the truth of an alleged libel, the courts would so decide and not await a jury to do so. In effect, the court held in that case that the truth so established was a complete defense to an action for libel.

Here we have two judicial or quasi-judicial decisions but the trial court sent them to the jury to determine whether they established the truth or substantial truth of the alleged libel and said nothing whatever about the defenses of privileges and fair comment.

Apparently the case was tried and considered on appeal as if it were a cause of action arising in the District of Columbia and governed by the *lex fori,* except that even in that both of the courts ignored *Nalla* v. *Oyster,* supra, stating the rule for their jurisdiction. Moreover, it is not the law of the local jurisdiction or of any other jurisdiction in the United States, so far as we are aware, that the meaning of judicial and quasi-judicial documents, and statutes, are for juries to determine, as if they were any other form of evidence.

V.

THE PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AND HIS PRIVILEGES AND IMMUNITIES IN VIOLATION OF ARTICLE IV, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES IN THE COURTS BELOW BY THEIR REFUSAL TO DETERMINE AS A MATTER OF LAW AND INSTRUCT THE JURY THAT THE TRUTH OF THE ALLEGED LIBEL HAD BEEN ESTABLISHED BY THE ORDERS AND OPINION OF A QUASI-JUDICIAL AGENCY OF THE COMMONWEALTH OF VIRGINIA AND A JUDGMENT OF ITS COURT OF RECORD AND BY LEAVING THE MEANING OF SUCH DOCUMENTS TO BE DETERMINED BY THE JURY.

We need not again recite to this Court the history of the Due Process Clause or of the Privileges and Immunities clause of the Constitution of the United States. That has been often done in the past and has been restated in numerous opinions of this Court.

We claim that it constitutes a denial to the petitioner of both the Due Process of Law and the Privileges and Immunities clauses for the trial court to instruct the jury as a matter of law that the alleged libelous language in the letter of July 12, 1945, written and published by the petitioner, was a libel *per se* and then to refuse in the next breath to instruct the jury that the official documents of Virginia relied upon in defense did or did not establish the truth of the alleged libel; that the said letter of July 12, 1945, was or was not privileged under the law of Virginia where it was circulated; and that the alleged libel was or was not fair comment on the language used in the opinion and order entered July 17, 1941 by the Virginia Real Estate Commission and by Section 8(g) and (j) of

the Virginia Real Estate License Act under which such order was entered.

The late Prof. Thayer, writing in 4 Harvard Law Review, 147-175, under the title of "Law and Fact in Jury Trials" learnedly stated the function of a judge to interpret the meaning of documents in jury trials, instead of leaving the same to the jury. Among other things he stated:

> "But whatever the character and however used, the construction of writing, when once the facts necessary for fixing it were known, was a matter for the court. This has always been so; perhaps a reason for it may be that as writings came into general use and so got with for courts, namely through the Roman ecclesiastics, so the Roman methods of dealing with them was naturally adopted; and once adopted, were not changed when new modes of trial came in. And to be sure, the jury could not read. It may be added that an established judicial usage like this has been always powerfully supported by considerations of good sense and expediency".

We are frank to advise the Court that we have found no case exactly in point, presumably because it has been so universally the practice for the courts to instruct juries as to the meaning of written documents that there has been no occasion for an appeal because of refusal of a court to do so. As stated by the Supreme Court of Appeals of Virginia in *Cook* v. *Patterson Drug Company,* 185 Va. 516, a:

> "* * * jury should not be permitted to indulge in conjecture as to the import of words".

We can not read the instructions of the trial court to the jury (R. 206-208) otherwise than as directing the jury to indulge in conjecture as to the import of words in the Virginia Real Estate License Act, in the order and opinion entered by the Virginia Real Estate Commission on July 17, 1941 under that Act finding the petitioner "guilty" of violating a subsection thereof, and in the jury verdict

and judgment entered by the Circuit Court of Arlington County with the further requirement on the jury that having determined the same, such jury was then to determine whether an ordinary reader would consider the import and meaning of the words substantially the same as the import and meaning of the words of the alleged libel.

Such action by the trial court, and its affirmance by the appellate court, we submit, violates the rule of practice from the earliest times and also violates petitioner's right to Due Process of Law under the Fifth Amendment as well as the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution of the United States.

VI.

THE PETITIONER HAS BEEN DENIED HIS FREEDOM OF SPEECH IN VIOLATION OF BOTH THE CONSTITUTION OF VIRGINIA AND THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN A VIRGINIA POLITICAL CAMPAIGN BY THE ACTION OF THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA IN THEIR REFUSAL TO HOLD THAT THE OFFICIAL RECORDS OF VIRGINIA IN EVIDENCE ESTABLISH THE TRUTH, PRIVILEGE, AND FAIR COMMENT OF THE ALLEGED LIBEL.

It is the right and duty of a citizen to participate fully in political campaigns, as the petitioner participated in the political campaign in July 1945 in Virginia. Under the Virginia law the people have a right to know the shortcomings of candidates for public office. This right lies at the very base of a republican form of government and is so recognized both in the Constitution of Virginia and in the opinions of her courts.

We do not claim that the petitioner had the legal right to libel the respondent in so doing and we insist that petitioner did not do so under the laws of Virginia. We ap-

preciate the statement that the respondent had engaged in "unethical and dishonest practices as a real estate broker" is a serious charge but at the same time we insist that the respondent had been previously found guilty by the Virginia Real Estate Commission and by the jury and Circuit Court of Arlington County of that charge.

To fail to account for or to remit moneys in respondent's possession belonging to Harry Humfeld is a serious offense. In many jurisdictions such refusal constitutes embezzlement or larceny and under the identical statute pursuant to which the Commission made its findings of "guilty" and revoked the license, the offense is punishable by a fine of $500 and/or imprisonment for six months without prejudice to any civil or criminal liability under the general laws of the Commonwealth of Virginia.

The facts with respect to that offense on the part of respondent were then, and are now *res judicata*. So also is the verdict of the jury and the judgment of the Circuit Court of Arlington County. By the concluding subsection (j) of Section 8 of the Virginia Real Estate License Act any other conduct:

> "* * * * whether of the same or a different character from that hereinbefore specified, * * constitutes improper, fraudulent or dishonest dealing"

for a which a license may be denied, or once granted, may be revoked and the punishments enumerated, or reserved, in the said Act may be imposed.

Under the Virginia law petitioner had the legal right to use the words he did because they had been established by the proper tribunals of Virginia to be true or substantially true, they were privileged, and they constituted fair comment on the reasons established by the Commonwealth of Virginia for the revocation of the license and for the denial of subsequent licenses until February 1944.

The judgment of the court below and the affirmance of that judgment by the United States Court of Appeals result

in a denial to the petitioner of the right to freedom of speech by courts of a foreign jurisdiction which courts most certainly did not apply the law of Virginia in the entry and affirmance of that judgment.

VII.

THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA MAY NOT ASSUME JURISDICTION OVER AND DETERMINE TRANSITORY CAUSES OF ACTION ARISING IN THE NEARBY COUNTIES OF VIRGINIA BETWEEN RESIDENTS OF VIRGINIA, THEREBY CREATING A LITTLE RENO OF THE DISTRICT OF COLUMBIA IN WHICH NON-RESIDENT PLAINTIFFS MAY WASH THEIR DIRTY LINEN WHEN THEY CAN SECURE PERSONAL SERVICE ON NON-RESIDENT DEFENDANTS IN SAID DISTRICT.

This point has been sufficiently briefed under preceding points but it has been stated here for the purpose of emphasizing the situation which is created for the courts of the District of Columbia as well as for defendants resident in nearby Maryland and Virginia if this case is permitted to stand as a precedent.

VIII.

IN A SUIT BROUGHT IN THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA ON A TRANSITORY ACTION FOR LIBEL ARISING IN VIRGINIA BETWEEN TWO RESIDENTS OF VIRGINIA, SUCH FEDERAL COURTS MAY NOT ENTER JUDGMENT FOR PUNITIVE DAMAGES.

The judgment in this case is for $15,000.00 compensatory damages and $15,000.00 punitive damages. It is horn book law that punitive damages in a libel action are penal and are imposed on a libellant as punishment.

The Federal courts in the District of Columbia are not charged with the enforcement of any laws of the Commonwealth of Virginia and more particularly not with the enforcement of the penal laws of that Commonwealth.

The right under Virginia law to recover in a libel action either compensatory or punitive damages is not a statutory right. Such damages are recoverable by virtue of the common law. See *Hines* v. *Gravins,* 136 Va. 313. Express malice must be shown in Virginia before recovery of punitive damages. *Lighter* v. *Osborne,* 142 Va. 19; *Windsor* v. *Carlton,* 136 Va. 652.

The letter of July 12, 1945, was not directed at respondent and he was mentioned therein as an incident of petitioner's opposition to Mr. Fenwick. That letter certainly does not show malice and there was an absolute failure of proof with respect to malice. Counsel for the respondent made an effort to show malice by testimony of the wife of the respondent, Mrs. Nellie Edwards, but that testimony was incompetent, immaterial, and prejudicial (R. 53-75). Her only evidence which could be considered as indicating malice concerned a telephone conversation which she alleged was with a man who stated he was N. C. Hines, but which petitioner denied, and she admitted that she could not identify the voice as being that of the petitioner who was then unknown to her.

The established judicial rule is that the testimony of a witness of an alleged telephone conversation is inadmissible when the witness can not identify the voice of the person with whom such witness had the telephone conversation except by relying upon a statement alleged to have been made by the person that his name is so and so. *Hirsch* v. *Sherman,* 205 NYS 434; *Milley* v. *Kelly,* 215 Mich. 254; *Cohen* v. *Standard Accident Insurance Co.,* 194 S. C. 533; *Wyckoff* v. *Jarrell,* 170 Atl. 802 and *Thomasson* v. *Davis,* 74 S. W. (2) 557.

CONCLUSION

Upon the whole case, it is believed that the petition for a writ of certiorari should be granted in this case and the case heard upon its merits.

Respectfully submitted,

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